IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO.372 OF 2001

(By accd against conviction)

1. Suresh Ganpat Pawar .. Appellants

2. Kishor Gajanan Deshmukh

versus

The State of Maharashtra .. Respondents

Mrs Revati Mohite-Dere for Appellants

Mr.P.S.Hingorani, A.P.P for State

CORAM : SMT.RANJANA DESAI AND D.G.KARNIK, JJ

JUDGMENT RESERVED ON: 4th April, 2006

JUDGMENT PRONOUNCED ON 18th April, 2006

ORAL JUDGMENT (Per D.G.Karnik, J)

1. By this appeal the appellants, who were accused nos. 1 and 4 in the sessions Court, challenge the order dated 25th May, 2001 convicting them under section 302 read with section 34 of the Indian Penal Code and the sentence of imprisonment for life and fine of Rs.5000/- each and in default further imprisonment of one year each.

The prosecution story in brief is as under :

2. Avinash Londhe (hereinafter referred to as the deceased) along with his wife Kavita went to reside with his mother-in-law Laxmibai Uttam Shinde in the night of 2nd January, 2000 as all of them wanted to go to Bombay on the next day. Appellants Suresh Ganpat Pawar (Accused No.1) and Kishore Deshmukh (accused no.4) were friends of the deceased Avinash and were visiting the house of Laxmibai occasionally. However, about six months or so prior to the incident there were some disputes between them and the deceased Avinash and therefore they were not on talking terms. On 3rd January, 2000 at about 9 a.m. the deceased had gone to a common toilet nearby when Laxmibai heard shouts of her son-in-law Avinash. Therefore she alongwith

her daughter, Kavita, wife of Avinash, came out and proceeded towards the common toilet. Hearing the screams of the deceased, Laxmibai and Kavita went inside the toilet when they saw the accused no.1, the accused no.4, Rajesh More and one another person assaulting the deceased Avinash with a sword, a sickle, a gupti, and a sharp iron plate. The assailants ran away as the crowd gathered. Laxmibai, who is the complainant, and her daughter Kavita then carried Avinash, who was injured, in an autorickshaw to the police chowky. The police gave a note (Ex 84) to the Dean Sassoon General Hospital for treatment of Avinash. Two constables also accompanied them to the Sasoon General Hospital. Shakil Shaikh (PW 13) the Assistant Police Inspector followed them and recorded the statement of Laxmibai (Ex 62) in the hospital and commenced the investigation. The accused nos.1 to 4 who were absconding were arrested on 7th January, 2000. At the time of the arrest the police attached the blood stained clothes which were worn by all the accused. After obtaining the chemical analyser's report and after completing the investigation the accused were charged and tried for the offence of murder. By his judgment and order dated 25th May, 2001, the learned Additional Sessions Judge, Pune

acquitted the accused no.2 Shyam Balvant More, and the accused no.3 Anant Anant More but convicted the appellants accused nos.1 and 4 under section 302 read with section 34 of the Indian Penal Code and sentenced them for life imprisonment as indicated earlier.

3. Mrs.Revati Mohite-Dere, learned counsel for the appellants, submitted that the learned Additional Sessions Judge erred in holding the appellants guilty for the offence under section 302 read with section 34 of the Indian Penal Code. She submitted that Laxmibai (PW 3) and Kavita (PW 4) i.e. mother-in-law and the wife of the deceased who claim to be the eye witnesses were not in fact the eye witnesses. There was no evidence on record as to the distance between the house of the Laxmibai and the common toilet but from the material on record it could be inferred that the distance was substantial. One was required to take two turns for reaching the common toilet and it was not likely that the shouts of the deceased Avinash would be heard by either of them. They must have gone there hearing the commotion after people had gathered and the real offenders had fled. Their contention that they had seen the accused no.1, the

accused no.4 and two other assailants assaulting the deceased was not probable. According to Laxmibai and Kavita (PW 3 and PW 4) they had taken the accused first to the police chowky. Kavita has deposed that she had gone to the chowky and her statement was recorded there and thereafter two constables accompanied them to the Sasoon General Hospital. The statement of Kavita which was recorded soon after the incident i.e. at about 9.45 a.m. has been deliberatedly suppressed by the prosecution. This was because probably Kavita had not given the names of the accused or any of the assailants but had stated that the deceased was assaulted by unknown assailants. The statement of PW 4 Laxmibai recorded by PW 13 in the Sasoon General Hospital was obviously not the FIR because the statement of PW 4 Kavita was recorded earlier. Learned counsel further submitted that the evidence of the alleged eye witnesses PW 3 and PW 4 was not reliable and had to be discarded. Both the eye witnesses had stated that they had physically removed Avinash, who was then injured, from the toilet in an autorickshaw and in the process their clothes were stained with blood. Though the police had seized the blood stained clothes of PW 3 and PW4 they were not sent to the chemical analyst and

in any event no report of the chemical analyser regarding the alleged blood staines on the clothes of the PW 3 and PW4 was produced on record. Counsel submitted that presence of blood stains of the deceased on their clothes would have corroborated the presence pf PW 3 and PW 4 at the scene of offence, whether at the time of assault or soon thereafter. The report of the chemical analyser regarding the alleged blood stains on the clothes of PW 3 and PW 4 was not produced because the clothes did not contain the bloodstains and PW 3 and PW 4 were not really present at the scene of the offence at all. As regards the recovery of the sword and the gupti at the instance of accused no.1, learned counsel submitted that the recovery was not proved. One panch for the recovery namely Dattatraya Oval (PW 6) was declared hostile and he did not support the prosecution at all. The second panch witness Husain Khan (PW 10) was so shattered in cross-examination that at the end of the cross-examination, he was also declared hostile and permission was sought by the prosecution to cross examine him but in the subsequent cross by the prosecution nothing was elucidated from him, Therefore, the recovery of the sword and the gupti at the instance of accused no.1 was not proved at

all. As regards the recovery of the sickle and the sharp iron plate at the instance of accused no. 4 it was submitted that the panch witness Wilson Chandewal (PW 7) was not believable. He was a stock panch of the police and has admitted that he had acted as a panch in some other matter also. Furthermore, a crime was registered against him at the very police station and he was even arrested for that crime. He was therefore deposing falsely to oblige the police to gain favours and advantage for himself from the police. His evidence therefore should not be believed. Learned counsel for the appellants further submitted that even if the recovery of the weapons at the instance of the accused no. 1 and the accused no.4 was to be believed still it did not fulfill the requirements of section 27 of the Indian Evidence Act. In the statement made to the police in presence of panchas the accused nos. 1 and 4 had never stated that they had concealed the weapons which they allegedly discovered. At best, from their statement, it could be stated that they had the knowledge of the concealment but as they had not stated that the weapons (of offence) were concealed by them, but the authorship of the concealment by them was not proved. Since the authorship of concealment was

not proved the accused could not be connected to the weapons nor can they be connected to the crime.

4. As against this, Mr.Hingorani, learned A.P.P. submitted that PW 3 and PW 4 were the eye witnesses to the crime. They had seen the accused nos. 1 and 4 assaulting the deceased with the sword and the sickle respectively. Their evidence was cogent and trusworthy. If the eye witnesses were trusworthy and their evidence was cogent and reliable no further evidence was necessary for sustaining the convictions of the accused. Even if the discovery of the weapons of the offence is not believed the conviction could be based solely on the basis of the testimony of PW 3 and PW4. Counsel further submitted that PW 4 was the wife and PW 3 was the mother-in-law of the deceased and therefore they would not be interested in shielding the real culprits. There was no enmity between the appellants and PW 3 and 4 and therefore their evidence should be believed. He further submitted that even if the panchas of the recovery were disbelieved, there was no reason to disbelieve Peter Lobo (PW 14) the Police Inspector who was the Investigating Officer, who had proved the recovery.

5. In her examination-in-chief before the Court Laxmibai (PW 3) has stated that on 2nd January, 2000 the deceased Avinash and his wife Kavita had been to her house as they were to go to Bombay on the next day. On the morning of 3rd January, 2000 the deceased had gone to the common toilet. She heard the shouts of her son-in-law Avinash and therefore she and her daughter Kavita rushed to the common toilet from which screams were coming. They saw the accused and two others assaulting the deceased. The accused no.1 was holding a sword, accused no.4 was holding a sickle, accused no.2 was holding a gupti and accused no. 3 was holding a sharp iron plate. The accused nos. 2 and 4 were assaulting the deceased on his head and accused nos. 2 and 3 were assaulting him on hands. People had gathered there but nobody was ready to touch the deceased. Then she and her daughter Kavita shifted the deceased in an autorickshaw and took him to the police chowky. Two constables accompanied them and the deceased was thereafter moved to the hospital. The statement of the complainant (PW 3) was recorded in the Sasoon General Hospital.

6. Kavita (PW 4) in her examination-in-chief

before the Court has given a substantially similar evidence about the incident. However, she has specifically stated in her deposition that her mother and she had gone to the police chowky and there she had given to the police the names of the assailants. Mrs. Revati Mohite-Dere, learned counsel for the appellants submitted that the information given by Kavita at about 9.30 a.m. when the deceased Avinash was first taken to the police chowky in an autorickshaw would be the First Information Report and that was deliberately suppressed by the prosecution because in the said statement Kavita had stated that the deceased was assaulted by unknown assailants. She further submitted that it is only after gathering the hearsay information that Laxmibai (PW 3) mentioned the names of the accused no. 1, the accused no.4 and the accused no.3.

7. The evidence of Kavita (PW 4) is contradicted by Assistant Police Inspector (API) Mr. Shakil Shaikh (PW 13), who is the Investigating Officer. Kavita claimed that she had been to the police station along her mother in the autorickshaw with the injured Avinash at about 9.30 a.m. PW 13 Shakil Shaikh in his deposition has categorically

stated " It is false to say that PW 4 Kavita Avinash Londhe had also accompanied with the complainant Laxmibai when Laxmibai entered the police station. The autorickshaw was at a distance of 15 ft away from the door of Parnakutir police chowky in which Avinash was kept. I have seen the injured personally after visiting the near rickshaw and the injuries on his person. "

The assertion of Kavita that she accompanied injured Avinash to the police chowky in the autorickshaw is specifically denied PSI Shaikh. We are therefore not inclined to accept the evidence of Kavita (PW 4) about her accompanying injured Avinash to the police chowky. We also seriously doubt the presence of Kavita at the scene of the offence at the time of the crime because she would not have lef her husband but, would in the ordinary course, have accompanied him to the police chowky and the hospital. We are therefore, not inclined to rely upon the testimony of PW 3 Kavita that she saw the accused nos. 1 and accused no.4 assaulting the deceased.

8. We, however, find that the evidence of Laxmibai PW 4 to be reliable and acceptable. Admittedly,

the deceased was brought to the police chowky in an autorickshaw. The note Exhibit 84 was issued by the police to the Dean, Sasoon General Hospital at about 9.45 a.m. stating that Avinash had suffered head injury and should be treated in the hospital. The note appears to have been issued at 9.45 a.m. on 3rd January, 2000. It is thus clear that Avinash was carried to the police chowky a little before 9.45 a.m. and was thereafter taken to Sasoon General Hospital by Laxmibai. API, Mr.Shaikh (PW 13) immediately followed them to the Sasoon General Hospital and recorded the statement of Laxmibai in the hospital itself. In his deposition, he stated that it took about 20 to 25 minutes to record the statement which was treated as the FIR (Exhibit 62). Thus, the FIR was lodged within an hour of the occurence of the crime. In the FIR Exhibit 62 Laxmibai has stated that Avinash was assaulted by Suresh Pawar (accused no. 1), Kishore Deshmukh (accused no.4) Rajesh More and one more black coloured tall person. She had specifically named accused nos. 1 and 4. She has further stated that accused no.1 was holding a sword and accused no.4 was holding a sickle and they were assaulting Avinash with the said sword and the sickle.The sword and the sickle, which was

later recovered under section 27 by the appellants, was identified by her before the Court. The accused were named in the FIR which was lodged immediately after the offence. Accused nos. 2 and 3 were not named personally and for that reason they have been acquitted by the Sessions Court. The Sessions Judge had believed Laxmibai (PW 3) as a truthful witness. We see no reason to take a different view.

9. When the occular evidence is clear, unambiguous and trustworthy, no further corroboration is needed as a matter of law. Courts however, look for corroboration by way of prudence. In the present case, the occular evidence of PW 3 Laxmibai is corroborated in material particulars. In the FIR (Exh 62) lodged by her immediately after the occurence she has specifically named accused no.1 and accused no.4. She had also named the weapons used by them. The weapons were discovered by accused no.1 and accused no.4 under section 27 of the Evidence Act. The weapons were identified by her before the Court. It is true that Dadu Oval (PW 6) was one of the panchas to the recovery of sword by the accused no.1 has turned hostile. It is also true that another panch Hussain Khan (PW

10) after deposing in his examination-in-chief about the recovery at the instance of accused no.1 turned hostile in the cross-examination and permission was given to the prosecution to cross-examine him in re-examination. However, the statement which led to recovery was made by the accused no. 1 in presence of API Peter Lobo (PW 14) who was one of the Investigating Officers. Accused no.1 expressed his desire to discover the weapons of offence concealed by him. His statement was recorded by PW-14 wherein A-1 stated as follows:

The portion translated in English reads thus:

> " Myself and my colleagues namely one Kishore Gajanan Deshmukh, Shyam Balwant More, Anand Anna More together on account of a previous quarrel and on account of previous assault made on my friend Kishore Deshmukh assaulted Avinash Sadashiv Londhe residing at Laxminagar in front of the public latrine near Nigadi Flour Mill, Netajinagar, Pune by a sickle, a sword, a gupti and an iron plate and caused him grievous hurt. The weapons which were possessed at that time by myself and my colleagues Shyam Balwant More namely the sword and the gupti are concealed by me in a small lane between two houses on the western side of the public latrine in Subhash Nagar, Yerwada. I would take out the said weapons, come with me. "

10. The accused no.1 had clearly stated (excluding the inadmissible portion about the assault) in the statement he had made to PW 14 that he had concealed the sword and the gupti which he was willing to take out. Accordingly, he showed and took out the sword and the gupti. The evidence of Peter Lobo (PW 14) regarding the statement made to him and discovery in the pursuance thereof is cogent and reliable. Though one panch has turned hostile and another panch turned hostle in the cross-examination, we see no reason to disbelieve the testimony of Peter Lobo (PW 14) regarding the discovery. The evidence of PW 3 regarding the use of the sword by accused no.1 is corroborated by the discovery of the sword made by him.

11. As regards the contention of Mrs Mohite Dere that the authorship of concealment by accused no. 1 was not proved, the statement extracted above would clearly show that the accused no. 1 had stated before API Peter Lobo (PW 14) three things namely (1) on account of previous quarrel accused and his two colleagues had assaulted Avinash with a sickle, a sword, a gupti and a iron plate ; (2) he had concealed the weapons viz. the sword and the gupti used by him and his colleague Shyam Balwant More in a small lane on the western side of the common latrine at Subhash Nagar, Yerwada; (3) he would show and take out the said weapons. The first part of the statement namely that he and his colleagues had assaulted the deceased Avinash are clearly inadmissible in evidence. However, the third part of the statement that he was willing to show the weapons is admissible once it is proved that the deceased could be assaulted by the said weapons. The statement made before the police regarding the discovery of those weapons would be clearly admissible as held by the Privy Council in Pullakori Kottaya vs Emperor reported in **AIR 1947 PC 67.** In his statement which is proved by PW 14, accused no.1 had clearly stated that he concealed

the weapons. Thus, he admitted the authorship of concealment and had also discovered the said weapons. In our view, the contention that accused no. 1 had not admitted the authorship of concealment of weapons has no merit.

12. Similarly, accused no. 4 stated to Peter Lobo (PW 14) that he was willing to show and take out the weapons of offence namely the sickle and the steel plate concealed by him in front of the residential house of his sister Ratnaprabha Ravi Jadhav. He accordingly, discovered the sickle and the iron plate. The panch Wilson Chandewal (PW 5) has supported the discovery. It is true that in his cross examination, PW 5 has admitted that he has acted as a panch prior to this panchanama. But, it appears that he acted as a panch in one other case only. It is also true that a crime had been registered against him at Yerwada police station for beating. But, on these two grounds, he cannot be disbelieved and it cannot be said to have falsely helped the police only because one case of beating had been registered against him in that police station. In any event, Peter Lobo (PW 14) the Investigating Officer has recorded the statement which led to the discovery. We see no

reason to disbelieve his evidence on this aspect. Thus, the statement of PW 3 that she saw accused no.4 assaulting the deceased with a sickle is also corroborated by the discovery of the sickle made by accused no.4.

13. We also do not find any merit in the criticism made by the learned counsel for the accused that though independent witnesses were available, they have not been examined by the prosecution. According to her, crowd had gathered when the assault took place. Therefore, statements of the persons who had gathered should have been recorded and they should have been examined as witnesses. We notice that statement of one Aruna Mukund Gaikwad who had also seen the assault was recorded. She was also examined as PW 7. However, she turned hostile. She admitted that murder of Avinash was committed in front of her house near the toilet at about 9 a.m. on 3rd January, 2000. However, she however, stated that 5 to 6 unknown persons had assaulted the accused. It appears that she was clearly won over when she resiled from her earlier statement made by her before the police. Even then, she has admitted that the mother-in-law and the wife of the deceased had arrived on the spot

though she qualified it by saying that they arrived after 10 to 15 minutes. She however, did not say that they arrived after the assailants had run away. Thus, even the hostile eye witness had also supported the presence of PW 3 at the scene of the offence and has not stated that PW 3 arrived after the assailants had run away. In any event, the prosecution cannot fail merely because one or more the eye-witnesses who are strangers turn hostile. We have already noted that PW 3 Laxmibai is an eye witness and she being the close relative of the deceased would naturally be interested in securing the conviction of the real culprits. The learned Sessions Judge has believed her - and we see no reason to takea different view. We believe her evidence which is corroborated in material particulars. The conviction can be based on her evidence.

14. For these reasons, we find no merit in the appeal which is hereby dismissed.

(SMT.RANJANA DESAI, J)

(D.G.KARNIK, J)